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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	91217792
Party	Plaintiff Andale Energy Drink Co., LLC
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Submission	Opposition/Response to Motion
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Date	07/23/2015
Attachments	Opposer's Motion to Accept Late Answer to Counterclaims.pdf(124423 bytes)

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
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Andale Energy Drink Co., LLC,)	
)	
Opposer,)	Opposition No. 91217792
)	Serial No. 85/891,919
)	Mark: DALÉ
v.)	
)	
ACP IP, LLC,)	
)	
)	
Applicant.)	
)	
)	

**OPPOSER'S MOTION TO ACCEPT LATE ANSWER TO COUNTERCLAIMS AND
OPPOSITION TO APPLICANT'S MOTION FOR DEFAULT JUDGMENT**

Pursuant to TBMP § 312.02, and for good cause shown, Opposer, Andale Energy Drink Co., LLC ("Opposer") hereby moves the Trademark Trial and Appeal Board ("Board") to accept its late Answer to Applicant's First Amended Counterclaims for Cancellation against Opposer's pleaded Registration No. 4455859 (ANDALE!). In the alternative, Opposer hereby opposes Applicant's Motion for Default Judgment filed on July 15, 2015 (Dkt. No. 16) and respectfully requests that the Board deny the motion and accept Opposer's late Answer. To avoid delay, Opposer has submitted its Answer herewith this motion.

The grounds for this request are as follows:

Opposer inadvertently missed the July 10, 2015, deadline to file an answer to Applicant's counterclaims because Opposer's counsel's law firm inadvertently recorded the deadline

incorrectly in its trademark docketing system as July 31, 2015, the deadline for the mandatory discovery conference as set forth in the Board's Order of May 11, 2015 ("Order," Dkt. No. 14). Opposer's counsel, Paulo A. de Almeida, was not specifically aware of the July 10, 2015, deadline in this proceeding due to the inadvertent docketing error. Opposer respectfully submits that the error in filing a late answer was not the product of gross negligence and has not resulted in any prejudice. Opposer's counsel sincerely apologizes for the delay in filing Opposer's Answer, submits that Opposer should not be penalized for its counsel's error, and respectfully requests that the Board accept Opposer's Answer submitted herewith as part of the opposition record.

The standard for determining whether default judgment should be entered against the defendant for its failure to file a timely answer is whether there is good cause why default judgment should not be entered against it. *See* TBMP § 312.02; *see also* Fed. R. Civ. P. 55(c). As a general rule, good cause to set aside a defendant's default will be found where the defendant's delay has not been willful or in bad faith, when prejudice to the plaintiff is lacking, and where defendant has a meritorious defense. *See Fred Hayman Beverly Hills, Inc. v. Jacques Bernier Inc.*, 21 USPQ2d 1556 (TTAB 1991) (Board accepted answer filed 9 days late, explaining, "[i]n the present case, the failure to timely file the answer was clearly due to an inadvertence on the part of applicant's counsel and not the result of any willful conduct or gross neglect. Moreover, the nine day delay in the filing of the answer will cause minimal prejudice to opposer. Finally, by the submission of an answer which is not frivolous, applicant has adequately shown that it has a meritorious defense.")

The determination of whether default judgment should be entered against a party lies

within the sound discretion of the Board. In exercising that discretion, the Board must be mindful of the fact that it is the policy of the law to decide cases on their merits. Accordingly, the Board is very reluctant to enter a default judgment for failure to file a timely answer and tends to resolve any doubt on the matter in favor of the defendant. *See* TBMP § 312.02.

Here, Opposer respectfully submits that good cause exists for accepting its late Answer because:

- the delay in filing an answer was not the result of willful conduct or gross neglect on the part of Opposer, as Opposer's counsel intended to file an answer before the deadline, but was unaware of the July 10, 2015 deadline because of an inadvertent docketing error;
- Applicant will not be prejudiced in any way by a short, insignificant delay of only 13 days—particularly in light of the overall schedule for this proceeding, with trial to be completed roughly one year from now—and particularly because the parties may continue to follow the current scheduling order of May 11, 2015, thus eliminating any possibility of undue delay; and
- Opposer has a meritorious defense to the counterclaims¹ because Opposer uses and has never abandoned its ANDALE! mark, and will prove that it sold ANDALE! beverages in interstate commerce—specifically, in Las Vegas, Nevada—before the filing date of its Statement of Use. In addition, Opposer's specimens are true and correct representations of

¹ Applicant has asserted counterclaims for (1) abandonment; (2) alleged "misrepresentations" regarding specimens submitted with Opposer's ANDALE! application; (3) that the ANDALE! registration is "*void ab initio*" due to alleged non-use in commerce; and (4) Opposer's use of its mark is "exclusively in California" and thus not in interstate commerce. *See* Applicant's First Amended Answer to Notice of Opposition, Affirmative Defenses, and Counterclaims, pp. 3-5.

actual ANDALE! products, and there is absolutely no basis for Applicant's suggestion that Opposer did not sell the products depicted therein. Accordingly, Opposer respectfully submits that good cause exists for the Board to deny Applicant's Motion for Default Judgment and accept Opposer's Answer to the counterclaims.

The facts set forth in this motion are true of my own knowledge unless otherwise noted and if called upon as a witness I could and would testify competently thereto. I declare under penalty of perjury that the foregoing is true and correct.

Respectfully submitted,

Date: July 23, 2015

By: /Paulo A. de Almeida/
Paulo A. de Almeida
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PROOF OF SERVICE

I hereby certify that a true and complete copy of the foregoing **OPPOSER'S MOTION TO ACCEPT LATE ANSWER TO COUNTERCLAIMS AND OPPOSITION TO APPLICANT'S MOTION FOR DEFAULT JUDGMENT** has been served on Jaime Rich Vining, the listed Correspondent for Applicant, on July 23, 2015, via First Class U.S. Mail, postage prepaid to:

Jaime Rich Vining
Friedland Vining, P.A.
1500 San Remo Ave., Suite 200
Coral Gables, FLORIDA 33146

/Paulo A. de Almeida/
Paulo A. de Almeida

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OPPOSER'S ANSWER TO APPLICANT'S FIRST AMENDED COUNTERCLAIMS

Opposer, Andale Energy Drink Co., LLC ("Opposer"), a California limited liability company, by its attorneys hereby responds to the allegations set forth in Applicant's First Amended Counterclaims for Cancellation ("Counterclaims") filed by ACP IP, LLC ("Applicant") (Dkt. No. 15), as follows:

1. Opposer admits that it has asserted ownership of the trademark ANDALE! as a basis for opposition in this proceeding, as alleged in Paragraph 1 of the Counterclaims, but denies that Applicant is being damaged by the continued presence of Opposer's ANDALE! registration on the Principal Register.
2. Opposer admits the truth of the allegations set forth in Paragraph 2 of the Counterclaims.
3. Opposer denies the truth of the allegations set forth in Paragraph 3 of the Counterclaims.

4. Opposer denies the truth of the allegations set forth in Paragraph 4 of the Counterclaims.
5. Opposer denies the truth of the allegations set forth in Paragraph 5 of the Counterclaims.
6. Opposer denies the truth of the allegations set forth in Paragraph 6 of the Counterclaims.
7. Opposer has insufficient knowledge or information as to the truth of the allegations set forth in Paragraph 7 of the Counterclaims, and therefore, denies such allegations.
8. Opposer denies the truth of the allegations set forth in Paragraph 8 of the Counterclaims.
9. Opposer denies the truth of the allegations set forth in Paragraph 9 of the Counterclaims.
10. Opposer denies the truth of the allegations set forth in Paragraph 10 of the Counterclaims.
11. Opposer has insufficient knowledge or information as to the truth of the allegations set forth in Paragraph 11 of the Counterclaims, and therefore, denies such allegations.
12. Opposer denies the truth of the allegations set forth in Paragraph 12 of the Counterclaims.
13. Opposer denies the truth of the allegations set forth in Paragraph 13 of the Counterclaims.
14. Opposer admits the truth of the allegations set forth in Paragraph 14 of the Counterclaims.
15. Opposer denies the truth of the allegations set forth in Paragraph 15 of the Counterclaims.

WHEREFORE, Opposer prays that Applicant's Counterclaims be dismissed with prejudice.

Respectfully submitted,

Date: July 23, 2015

By: /Paulo A. de Almeida/
Paulo A. de Almeida
Alex D. Patel
Patel & Almeida, P.C.

Attorneys for Opposer,
Andale Energy Drink, LLC

PROOF OF SERVICE

I hereby certify that a true and complete copy of the foregoing **OPPOSER'S ANSWER TO APPLICANT'S FIRST AMENDED COUNTERCLAIMS** has been served on Jaime Rich Vining, the listed Correspondent for Applicant, on July 23, 2015, via First Class U.S. Mail, postage prepaid to:

Jaime Rich Vining
Friedland Vining, P.A.
1500 San Remo Ave., Suite 200
Coral Gables, FLORIDA 33146

/Paulo A. de Almeida/
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